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Supreme Court of the United States.

OCTOBER TERM, 1925.

No. 334.

BERIZZI BROTHERS COMPANY,

Appellant,

—against—

The Steamship "PESARO", her engines, boilers, etc., and DON GELASIO CAETANI, Royal Italian Ambassador.

BRIEF FOR THE APPELLANT.

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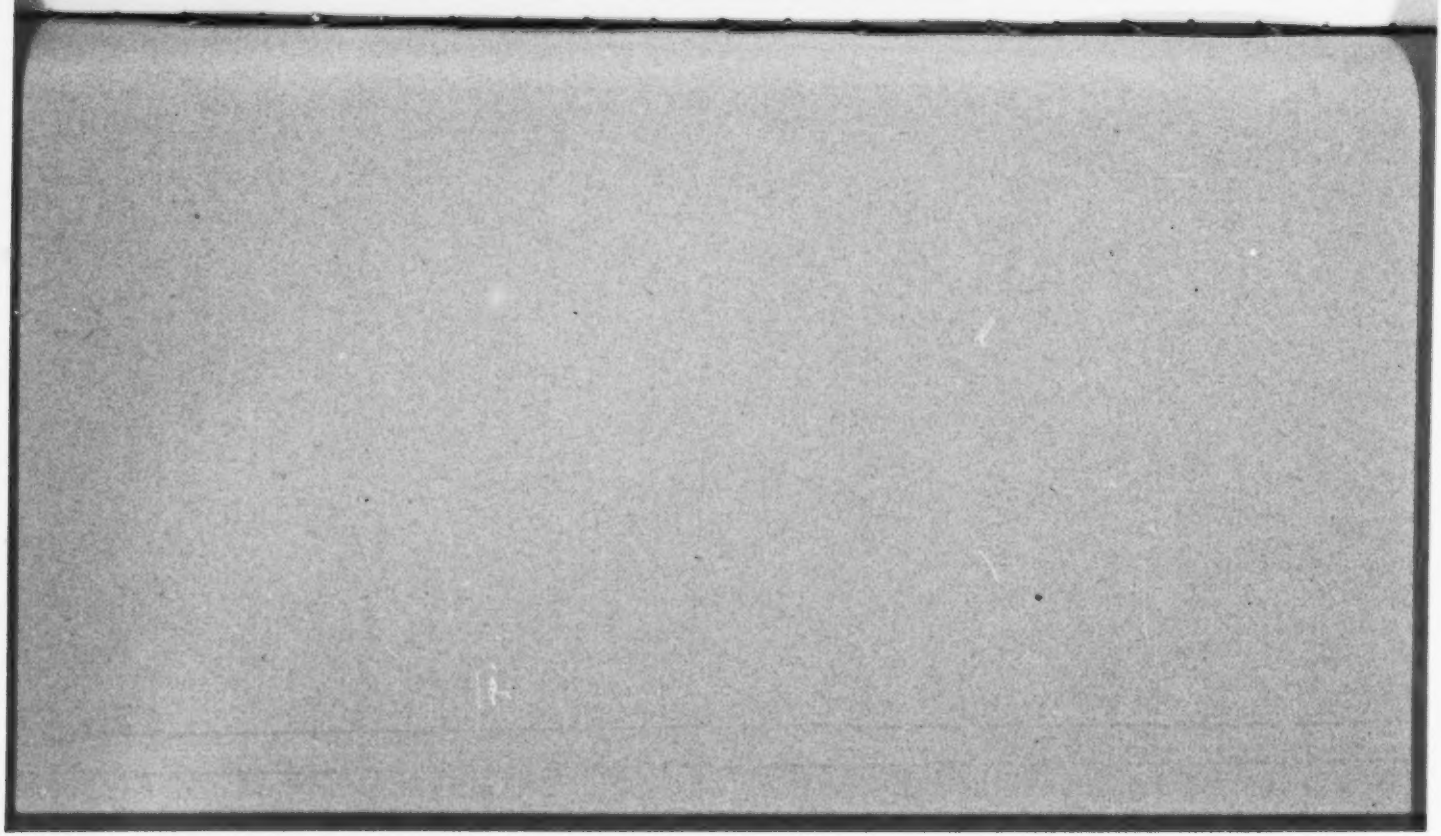

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BERIZZI BROTHERS COMPANY,

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The Steamship "PESARO", her engines, boilers, etc., and DON GELASIO CAETANI, Royal Italian Ambassador.

BRIEF FOR THE APPELLANT.

Statement.

This is a direct appeal from the District Court, for the Southern District of New York, upon a certificate that the sole issue before the Court was its jurisdiction as a Court of Admiralty (Rec., 19-20).

The appeal herein was perfected in May of 1925, in conformity with Sec. 238 of the Judicial Code in its then existing form. This being an admiralty action *in rem* against a foreign government-owned vessel and the District Court having dismissed the libel on March 2, 1925 (Rec., 17), for alleged lack of jurisdiction over such a suit, this course of procedure on appeal was the proper one and this Court has jurisdiction of the case. *The Pesaro,* 255 U. S. 216; *The Carlo Poma,* 255 U. S. 219.

Facts.

The facts were all stipulated (Rec., 11-12) and may be summarized as follows:

The steamship *Pesaro* was owned by the Kingdom of Italy and was registered in the name of the Ministry for Railway and Maritime Transportation, which is a department of the Italian Government charged with affairs of maritime and rail transportation, the head of which is a member of the Italian Cabinet. The ship was in the possession of the Government, and the Master, officers and crew were employed by, and under the direction of, the said Ministry.

The *Pesaro* was employed in the carriage of merchandise for hire between various ports in Italy, on the one hand, and various ports of the world lying outside of Italy, including the port of New York, on the other hand. The ship was not functioning in any naval or military capacity, nor under the immediate direction of those departments of the Italian Government having to do with naval and military affairs, and neither the vessel nor her Master, officers or crew, were under the orders of, or connected with, the naval or military establishments.

Under these conditions, the ship loaded, among other things, 75 cases of artificial silk at Genoa on the 28th of August, 1919, to be carried by the ship as a common carrier to the port of New York (Rec., 2 and 4). She failed to deliver one of such bales at New York, and the appellant, the owner of such silk, filed a libel *in rem* against her in the District Court, for the Southern District of New York, to recover for the loss of the silk.

It is stipulated that if the steamship is subject to suit, despite the claim of sovereign immunity, the appellant would be entitled, by reason of the admitted failure to deliver the bale of silk in question (Rec., 10), to recover $250, that being the valuation per package expressed in the bill of lading (Rec., 12).

Previous Proceedings.

The present claim is one of several that arose on the same voyage, and in order that the Court may understand the complete course of the litigation, we will refer, briefly, to the previous proceedings on all the claims.

The *Pesaro* was originally seized in January of 1920 under a libel *in rem* filed by Luzzato and others in the United States District Court for the Southern District of New York, setting out a cause of action similar to the one here involved. Thereupon the Italian Ambassador filed a suggestion of want of jurisdiction and the libellant requested permission to traverse the suggestion, but the request was denied, the District Court holding that to controvert or question the suggestion was not allowable. The District Court thereupon vacated the process of attachment. The libellant appealed directly to this Court, and this Court reversed on the ground that the suggestion was not conclusive and remanded the case for the taking of proofs.

The Pesaro, 255 U. S. 216.

As the *Pesaro* had been erroneously released by the District Court, the present appellant (and other libellants) filed new libels *in rem* with the Clerk of the

United States District Court for the Southern District of New York and the ship was seized upon her next return to New York. The Master thereupon appeared specially and set up a plea of immunity. Proofs were taken and were later embodied in a stipulation of facts, upon which a final hearing was had in the District Court before Judge Mack. He held that a merchant ship was subject to the process of our Admiralty Courts even though owned and operated by a foreign sovereign. His opinion is the fullest discussion of the merits of the issue in this country. It is reported as follows:

The Pesaro, 277 Fed. 473.

Thereafter this Court decided that a claim of sovereign immunity could not be raised by the Master, at least without special authority from his sovereign.

The Gul Djemal, 264 U. S. 90.

The Italian Ambassador (doubtless being advised of this decision and realizing that, as a result of it, the decision of Judge Mack denying immunity would necessarily be affirmed on appeal upon the same technical ground) then appeared specially in the proceedings and filed a claim on behalf of his sovereign and an answer, asserting that the ship was immune from process of our courts (Rec., 6 and 10-11).

The facts were again stipulated in a form substantially similar to the stipulation which had previously been entered into before Judge Mack. Upon this record the case was heard by Judge Augustus N. Hand, who, in a very brief opinion (1925 A. M. C. 465), sustained the plea of immunity (Rec., 15-16), and thereupon this appeal was taken.

Counsel for both sides were of opinion that the court papers which were before Judge Mack and which were filed prior to the special appearance of the Italian Ambassador, were immaterial to the hearing of the appeal and that the only essential papers were those considered by Judge Hand. In order to simplify the record by omitting the immaterial papers, the parties consented to the striking from the files of the court of such documents, and the District Court, upon such stipulation, entered an order to that effect (Rec., 8-9).

The Italian Government and all those who have purported to act on its behalf have been careful not to enter any general appearance on its behalf or to assert any affirmative claim on its behalf, and it has been expressly stipulated that the Italian Government has never consented to the present suit (Rec., 12). The appellant makes no claim that the Italian Government has by its course of procedure in this case in any way waived any immunity to which the ship may be entitled.

The plea of immunity is put forward by the duly accredited Ambassador of Italy to the United States (Rec., 12), and the appellant makes no claim based on any possible technical irregularity in the method of claiming immunity.

Opinion of the District Court.

The opinion of the District Court in this case is reported in 1925 A. M. C. 465, and is to be found on pages 15 and 16 of the record. In his opinion, Judge Augustus N. Hand stated that he was disinclined to follow the previous ruling of Judge Mack in this same

action (*The Pesaro,* 277 Fed. 473), preferring to follow the doctrine as expressed by the Circuit Court of Appeals for the Second Circuit in *The Carlo Poma,* 259 Fed. 369, although the decree in that case had been vacated by this Court (*The Carlo Poma,* 255 U. S. 219), and as also expressed by Judge Hough in *The Maipo,* 252 Fed. 627, and, therefore, dismissed the libel herein for lack of jurisdiction.

The Issue.

The present record presents for decision the single question whether a ship, owned and operated by a foreign sovereign, but employed solely as a merchant ship in the common carriage of goods for hire, is immune from process *in rem* in Admiralty.

Appellant's Contentions.

While admitting that a foreign warship is, of course, immune from process in admiralty, the appellant herein contends that such immunity arises not merely from ownership and possession by a foreign sovereign, but primarily from the appropriation of the vessel to a national object, and that the operation of a merchant vessel in a strictly commercial capacity, especially at a time when no emergency exists, does not impress such a vessel with a public use, and that, therefore, a vessel so employed, even though owned by a foreign sovereign, is not immune from process *in rem.*

POINT I.

The distinction between the operations of a government in its sovereign capacity while carrying on national objects, and its operations in its commercial capacity carried on for profit, has been recognized by the courts from the earliest times.

1. In the decisions with respect to the jurisdiction over ships owned by sovereigns, this Court has carefully preserved the distinction between ships used for public purposes and ships used for commercial purposes. We venture to review all the decisions of this Court dealing with the immunity of ships, together with a few of the leading decisions of other American courts, in chronological order. (Italics are ours.)

The Exchange, 7 Cranch. 116 (1812).

This case involved the immunity of a French warship. Mr. Chief Justice Marshall, in the course of his opinion, said, page 145:

> "Without indicating any opinion on this question, it may safely be affirmed, that *there is a manifest distinction between the private property of the person who happens to be a prince, and that military force which supports the sovereign power, and maintains the dignity and the independence of a nation. A prince, by acquiring private property in a foreign country, may possibly be considered as subjecting that property to the territorial jurisdiction; he may be considered as so far laying down the prince, and assuming the character of a private individual;* but this he

> cannot be presumed to do, with respect to any portion of that armed force, which upholds his crown, and the nation he is intrusted to govern."

United States v. *Wilder,* 3 Sumn. 308, F. C. No. 16,694 (1838).

This case involved the right of a shipowner to assert a possessory lien to secure general average contributions from a commercial cargo of clothing belonging to the United States. Mr. Justice Story, sitting at Circuit, referred to the decision in *The Exchange*, and said of it:

> "But it was not decided, that the other property of a foreign sovereign, not belonging to his military or naval establishment, was entitled to similar exemption."

And again in the course of that opinion, he observed, in discussing the sovereign immunity pertaining to armed vessels of war:

> "That distinction might well apply to property like public ships of war, held by the sovereign *jure coronae,* and not be applicable to the common property of the sovereign of a commercial character, or engaged in the common business of commerce."

Briggs v. *The Light Boats,* 11 Allen (93 Mass.) 157 (1865).

This was a suit to enforce a lien for labor and materials used in the construction of light boats, title to which had vested in the United States before these proceedings were commenced. HELD no lien was enforcible, as (p. 164)

> "these *light boats were built and held for public objects* only, and were unsuitable for any other. They were, in the precise and emphatic language of the plea to the jurisdiction, 'held and owned by the United States *for public uses, and as instruments for the execution of their sovereign and constitutional powers*'."

Referring to immunity of war vessels, the Court remarked (p. 165):

> "The immunity from such interference arises, not because they are instruments of war, but because they are *instruments of sovereignty;* and does not depend on the extent or manner of their actual use at any particular moment, but *on the purpose to which they are devoted.*"

The Siren, 7 Wall. 152 (1868).

A prize ship in charge of a prize Master and crew sank another vessel while en route to a port of adjudication. On the Government's libel it was condemned as a prize and the proceeds paid into Court registry. The owners of the vessel sunk intervened and sought to have their damages paid out of the fund. The Court allowed the intervenor's claim on the ground that the proceeds had come within the Court's jurisdiction through the act of the Government in libelling the vessel and, therefore, the Court had jurisdiction to distribute them to those entitled.

The Davis, 10 Wall. 15 (1869).

HELD that a lien for salvage services could be enforced against personal property of the United States where the process of the Court could be enforced with-

out taking property out of the actual possession of government officers.

Long v. *The Tampico,* 16 Fed. 491 (S. D., N. Y.—1883).

This was a libel *in rem* for salvage against boats which were claimed as the property of the Mexican Government. Judge Brown reviewed the immunity cases and summarized them as follows (p. 494):

> "These cases fully sustain the general proposition that the property of a government while in its possession and *employed in or devoted to the public use,* is exempt from judicial process, on the ground that the exercise of such jurisdiction is inconsistent with the independence of the sovereign authority and the necessities of public service."

In re Muir (*The Gleneden*), 254 U. S. 522 (1921).

In this case a suggestion had been filed by counsel for the British Embassy *amicus curiae,* suggesting that *The Gleneden,* though privately owned, had been requisitioned by the British Government. This Court declined to grant a writ of prohibition in advance of the actual trial of the issues.

The Pesaro, 255 U. S. 216 (1921).

This Court held that a mere suggestion of immunity filed by an Ambassador was not sufficient justification for the release of the ship as the libellants were entitled to their day in court to try the facts.

We would also draw this Court's attention to the

further proceedings then held in this case, as reported in *The Pesaro,* 277 Fed. 473. Judge Mack's opinion therein, upholding the jurisdiction of the District Court, not only contains an interesting review and analysis of the previous American decisions on this point, but also goes into a discussion of the European authorities. We believe it to be the fullest discussion of the merits of this question in this country.

The Carlo Poma, 255 U. S. 219 (1921).

This was a libel *in rem* for cargo damage. The Circuit Court of Appeals affirmed an order staying execution of process merely upon the suggestion of the Italian Ambassador. The case was then carried to this Court, which reversed on the ground that the Circuit Court of Appeals had no jurisdiction as the appeal lay only to the Supreme Court.

Ex parte Hussein Lufti Bey (*The Gul Djemal*), 256 U. S. 616 (1921).

In this case this Court denied a petition for a writ of prohibition in the case of a ship owned and operated by the Turkish Government, on the ground that the question of jurisdiction was "an open one and of uncertain solution".

Ex parte City of New York, No. 1, 256 U. S. 490 (1921);
Ex parte City of New York, No. 2, 256 U. S. 503 (1921).

These cases were libels *in rem* against various steamtugs. In the first case, the tug owners, appearing as claimants, sought to implead the Superintendent of

Public Works of the State of New York *in personam*. The Court granted a writ of prohibition, saying (p. 501):

> "As has been shown, the proceedings against which prohibition is here asked have no element of a proceeding *in rem*, and are in the nature of an action *in personam* against Mr. Walsh, not individually, but in his capacity as Superintendent of Public Works of the State of New York. * * * In the fullest sense, therefore, the proceedings are shown by the entire record to be in their nature and effect suits brought by individuals against the State of New York and, therefore,—since no consent has been given—beyond the jurisdiction of the courts of the United States."

In the second suit a libel *in rem* had been filed against the tug *Queen City* and the Attorney-General of the State of New York filed a suggestion of want of jurisdiction on the ground that the tug (p. 508)

> "was the absolute property of the State of New York, in its possession and control, and employed in the public service of the state for governmental uses and purposes."

This Court granted a writ of prohibition, saying, among other things (p. 510):

> "By the law of nations, a vessel of war owned by a friendly power and employed in its service will not be subjected to admiralty process; and this upon general grounds of comity and policy. *Schooner Exchange* v. *McFaddon*, 7 Cranch. 116, 144-147. In a case before Judge Francis Hopkin-

son in the Admiralty Court of Pennsylvania in 1781, on a plea to the jurisdiction, it was adjudged that marines enlisting on board a ship of war or vessel belonging to a sovereign independent state could not libel the ship for their wages. *Moitez* v. *The South Carolina,* Bee, 422; Fed. Cas. No. 9,697. The question whether by international law the rule of *The Exchange* is to be applied to other kinds of public vessels owned or controlled by friendly powers (see *The Parlement Belge* (1880), L. R. 5 Prob. Div. 197), was stirred in *Ex parte Muir, supra,* but found unnecessary to be decided. It does not now press for solution; * * *"

The Western Maid (and other ships), 257 U. S. 419 (1922).

These cases involved the question of the immunity of certain vessels owned (absolutely or *pro hac vice*) by the United States. The vessels involved were (1) the *Western Maid,* which was allocated by the United States Shipping Board to the War Department for service as a transport, and had been loaded with foodstuffs for the relief of the civilian population of Europe, to be delivered on arrival at Falmouth to the order of the Food Administration Grain Corporation, subject to the direction of Mr. Hoover; (2) the *Liberty,* which was a pilot boat manned by a crew from the United States Navy and commissioned as a naval dispatch boat and was employed to serve military needs in war service; (3) the steamship *Carolinian,* which was manned by an Army crew and employed as an Army transport. This Court held that all three of the vessels were entitled to immunity. Mr. Justice Holmes, in

delivering the opinion of the Court, holding these three vessels immune from process even after they had been returned to private service as merchant vessels, was significantly careful to point out that each was employed in a public service at the time the cause of action arose. At page 431 he said:

> "The *Liberty* and the *Carolinian* were employed for public and government purposes and were owned *pro hac vice* by the United States. It is suggested that the *Western Maid* was a merchant vessel at the time of the collision, but the fact that the food was to be paid for and the other details adverted to in argument cannot disguise the obvious truth, that she was engaged in a *public service* that was one of the constituents of our activity in the war and its sequel, and that had no more to do with ordinary merchandising than if she had carried a regiment of troops."

Later in the opinion, at page 433, he said:

> "If then we imagine the sovereign power announcing the system of its laws in a single voice it is hard to conceive it as declaring that while it does not recognize the possibility of its acts being a legal wrong and while its immunity from such an imputation of course extends to its property, at least *when employed in carrying on the operations of the government,—specifically appropriated to national objects*, in the language of *Buchanan* v. *Alexander*, 4 How. 20—yet if that property passes into other hands, perhaps of an innocent purchaser, it may be seized upon a claim that had no existence before."

The Sao Vicente, 260 U. S. 151 (1922).

There were two sets of libels in this group of cases, one set *in personam* and one *in rem*. It was held in connection with both sets that any claim of sovereign immunity had been waived by the filing of a general appearance and the furnishing of a stipulation for value.

The Gul Djemal, 264 U. S. 90 (1924).

This was a libel *in rem* for services and supplies furnished a vessel owned by the Turkish Government and in its possession and operated by it as a merchant ship. A suggestion of immunity was filed by the Master and this Court held that the Master had no authority to assert immunity on behalf of his sovereign, at least in the absence of special authority, which was not shown, and affirmed the decision of the lower Court retaining jurisdiction.

Ex parte Transportes Maritimos, 264 U. S. 105 (1924).

This was an original petition for prohibition or mandamus by the duly accredited Minister of the Republic of Portugal to stay an action *in rem* for supplies furnished to a vessel "owned and operated by the Transportes Maritimos do Estado, a department of the sovereign government of Portugal". This Court said, at page 108:

> "Plainly the trial court obtained jurisdiction over the *res*, and, in the absence of any claim of immunity, it would have been required to render judgment."

Holding that the proper steps to secure an orderly review had not been taken, this Court dismissed the petition.

In the above review, we have briefly summarized all the decisions of this Court on the subject of a vessel's immunity and a few of the leading cases in other courts. We have not attempted to review all the decisions in the lower Federal courts arising out of the recent war, because they are quite numerous, their reasonings are divergent, and the results reached are quite inconsistent. Some of them are reviewed in the opinion of the District Court in this case (Rec., 15-16), whose conclusion was that

> "further discussion in a court of first instance seems futile and the matter should await the authoritative announcement of the Supreme Court" (Rec., 16).

2. This distinction, apparent throughout all the above admiralty cases, in the nature of the acts of a sovereign between sovereign and commercial functions, *jus corona* and *jus commercium*, has been repeatedly recognized in other branches of the law, of which the following cases in this court are illustrations. (Italics are ours):

Bank of U. S. v. *Planters Bank*, 9 Wheat. 904.

This was a suit against a bank incorporated under state laws and of which the state itself was a stockholder. Mr. Chief Justice Marshall said, at page 906:

> "It is, we think, a sound principle, that when a government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its

privileges and its prerogatives, *it descends to a level with those with whom it associates itself and takes the character which belongs* to its associates, and *to the business which is to be transacted.*"

South Carolina v. *United States*, 199 U. S. 437,

where it was held that persons who sell liquor are not relieved from liability for United States internal revenue taxes by the fact that they have no interest in the profits of the business and are simply the agents of a State which has taken charge of the business of selling liquor. Mr. Justice Brewer said, at page 461:

"* * * the exemption of state agencies and instrumentalities from National taxation is limited to those which are of a strictly governmental character, and does not extend to those which are used by the State in the carrying on of an ordinary private business.

In this connection may be noticed the well-established distinction between the duties of a public character cast upon municipal corporations and those which relate to what may be considered their private business, and the different responsibility resulting in case of negligence in respect to the discharge of those duties. The Supreme Court of Massachusetts speaking by Mr. Justice Gray (afterwards an Associate Justice of this court), in *Oliver* v. *Worcester*, 102 Mass. 489, 499, 500, observed:

'The distinction is well established between the responsibilities of towns and cities for

> acts done in their public capacity, in the discharge of duties imposed upon them by the legislature for the public benefit, and for acts done in what may be called their private character, in the management of property or rights voluntarily held by them for their own immediate profit or advantage as a corporation, although inuring, of course, ultimately to the benefit of the public.'"

And again at page 463:

> "Now, if it be well established, as these authorities say, that there is a clear distinction as respects responsibility for negligence between the powers granted to a corporation for governmental purposes and those in aid of private business, a like distinction may be recognized when we are asked to limit the full power of imposing excises granted to the National Government by an implied inability to impede or embarass a State in the discharge of its functions. It is reasonable to hold that while the former may do nothing by taxation in any form to prevent the full discharge by the latter of its governmental functions, yet whenever a State engages in a business which is of a private nature, that business is not withdrawn from the taxing power of the nation."

Los Angeles v. *Los Angeles Gas Corp.*, 251 U. S. 32.

This was an action by a public utility corporation against the City of Los Angeles for removing the former's fixtures in order to install a municipal lighting sys-

tem. In holding for the plaintiff, this Court by Mr. Justice McKenna said, at page 38:

> "The Court reasoned and concluded that what the city did was done not in its governmental capacity—an exercise of the police power—but in its 'proprietary or quasi-private capacity' and that therefore the city was subordinate in right to the corporation, the latter being an earlier and lawful occupant of the field. *The difference in capacities is recognized and the difference in attendant powers pointed out in decisions of this Court. Vilas* v. *Manila*, 220 U. S. 345; *Russel* v. *Sebastian*, 233 U. S. 195; *South Carolina* v. *United States*, 199 U. S. 437; *New Orleans Gas Co.* v. *Drainage Commission*, 197 U. S. 453; *Vicksburg* v. *Vicksburg Waterworks Co.*, 206 U. S. 496, 508."

Horowitz v. *United States*, 267 U. S. 458.

This was an action brought by one Horowitz against the United States, under the Tucker Act, to recover damages for the alleged breach of a contract relating to the purchase of silk from the Ordnance Department. The sole breach of contract alleged was the failure to ship the silk prior to March 4, 1920, which failure was caused by an embargo placed by the United States Railroad Administration on shipments of silk by freight. In affirming the ruling of the Court of Claims sustaining a demurrer to the petition for failure to state a cause of action, this Court by Mr. Justice Sanford said, at page 461:

> "It has long been held by the Court of Claims that the United States when sued as a contractor

cannot be held liable for an obstruction to the performance of the particular contract resulting from its public and general acts as a sovereign. *Deming* v. *United States,* 1 Ct. Cls. 190, 191; *Jones* v. *United States,* 1 Ct. Cls. 383, 384; *Wilson* v. *United States,* 11 Ct. Cls. 513, 520. In the *Jones* Case, *supra,* the Court said, 'The two characters which the government possesses as a contractor and as a sovereign cannot be thus fused; nor can the United States while sued in the one character be made liable in damages for their acts done in the other. Whatever acts the government may do, be they legislative or executive, so long as they be public and general, cannot be deemed specially to alter, modify, obstruct or violate the particular contracts into which it enters with private persons. In this court the United States appear simply as contractors; and they are to be held liable only within the same limits that any other defendant would be in any other court. Though their sovereign acts performed for the general good may work injury to some private contractors, such parties gain nothing by having the United States as their defendants.'"

See also *Rindge Co.* v. *Los Angeles,* 262 U. S. 700, where this Court said, at page 705, that

> "The nature of the use, whether public or private, is ultimately a judicial question."

And also, among others:

Bank of Kentucky v. *Wistar,* 3 Peters 431;
Penn. v. *Bridge Co.,* 13 How. 518;
Curran v. *Arkansas,* 15 How. 304;
Vilas v. *City of Manila,* 220 U. S. 345.

3. Furthermore, in admiralty actions this distinction between commercial and sovereign functions is all the easier to make and to apply and is in reality fundamental, for in this country, under our theory of actions *in rem,* the ownership of the vessel is in reality immaterial, it being a well established "principle of the maritime law that the ship, by whomsoever owned and navigated, is considered as herself the wrongdoer liable for the tort" (per *The John G. Stevens,* 170 U. S. 113, 120).

POINT II.

The principle upon which the question of immunity depends.

Any consideration of the philosophical basis of immunity for a vessel owned by a foreign sovereign must begin with *The Exchange,* 7 Cranch. 116.

In that case the reasoning of Chief Justice Marshall was as follows: The jurisdiction of a sovereign nation, of which the jurisdiction of the court is a part, is necessarily exclusive and absolute within its own territory, and susceptible of no limitation except such as may be imposed by the sovereign itself. No other sovereign, therefore, can have any sovereign rights within the territory of another sovereign. All exceptions to the full and complete power of the nation within its own territory must be traced to the consent of the nation itself, either expressed in some treaty or implied. No treaty of the United States confers any immunity upon the ships of any foreign sovereign. If such immunity

exists, it must be implied, and the real question is the extent to which our courts will imply a consent by this nation to grant immunity to a foreign sovereign.

Chief Justice Marshall stated that such a consent might, in some instances, be implied from common usage. He cited, as illustrations of a usage to grant immunity, the privileges extended to the person of a foreign sovereign, to foreign ministers, and to troops of a foreign prince permitted to pass through the country, and he implied a similar immunity in the case of foreign warships within the territory of the United States.

Summarizing, the Chief Justice said (p. 143):

> "The preceding reasoning has maintained the propositions that all exemptions from territorial jurisdiction, must be derived from the consent of the sovereign of the territory; that this consent may be implied or expressed; and that when implied, its extent must be regulated by the nature of the case, and the views under which the parties requiring and conceding it, must be supposed to act."

See also:

The Santissima Trinidad, 7 Wheat. 283, 352.

In applying this test, is there any fairer method than by implying that our nation grants to foreign sovereigns the same immunities that it demands for itself? Can a foreign sovereign reasonably require a more favorable decision than the application of the Golden Rule?

If this is the proper test, then no foreign merchant ship should be accorded immunity because the public

policy of the United States is clearly established that our Government claims no immunity for its own merchant ships. This policy has been uniform as a matter of substantive law from the first act authorizing the government ownership of merchant ships and has varied only as to matters of procedure.

That the test of the immunity to be extended to property owned by a foreign government is to be determined by the same immunity which this Government demands for itself in regard to similar property is the true test is further shown by the language quoted below. (Italics are ours.)

In *The Santissima Trinidad,* 7 Wheat. 283, at page 352, Mr. Justice Story, in delivering the opinion of the Court of which Marshall was still Chief Justice, stated that:

> "In the case of *The Exchange* (7 Cranch 116) the grounds of *the exemption of public ships* were fully discussed and expounded. It was there shown, that it *was not founded upon any notion that a foreign sovereign had an absolute right in virtue of his sovereignty, to an exemption of his property* from the local jurisdiction of another sovereign, when it came within his territory; for that would be to give him sovereign power beyond the limits of his own empire. *But it stands upon principles of public comity* * * *."

Comity being thus seen to be the real basis for immunity, even as regards a public armed ship, the rule as to comity, as defined by Mr. Chief Justice Taney in *Bank of Augusta* v. *Earle,* 13 Pet. 519, at page 589, should be noted.

> "It is the voluntary act of the nation by which it is offered; and *is inadmissible, when contrary to its policy, or prejudicial to its interests.*"

So also in *Russian Soviet Republic* v. *Cibrario,* 235 N. Y. 255, the New York Court of Appeals said (p. 259):

> "It is yielded as a favor. * * * This rule (of comity) is always subject, however, to one consideration. *There may be no yielding, if to yield is inconsistent with our public policy.*"

Let us see then what is the public policy of the United States in regard to vessels owned by it, but employed solely as merchant vessels.

THE POLICY OF THE UNITED STATES, AS SHOWN IN THE ACTS OF CONGRESS, HAS BEEN TO SUBJECT GOVERNMENT OWNED MERCHANT SHIPS TO THE SAME LAWS, REGULATIONS AND LIABILITIES AS PRIVATELY OWNED SHIPS.

The original Shipping Act of 1916 (39 Stat. L. 728) provided as follows in Section 9:

> "Every vessel purchased, chartered, or leased from the board shall, unless otherwise authorized by the board, be operated only under registry or enrollment and license (American). Such vessels while employed solely as merchant vessels shall be subject to all laws, regulations and liabilities governing merchant vessels, whether the United States be interested therein as owner, in whole or in part, or hold any mortgage, lien, or other interest therein."

Section 9 of the above Act, was supplanted by a new Section 9 in the Act of July 15, 1918 (40 Stat. L. 900).

But the above quoted subdivision of the original Section 9 was retained verbatim in the amended Section 9 of the Act of July 15, 1918. The Shipping Act of 1916 was further amended in many respects by the Merchant Marine Act of 1920 (Act of June 5th, 1920, 41 Stat. L. 988). The above quoted clause of Section 9 of the Shipping Act of 1918 was, however, left intact in Section 18 of this Act as originally worded in the original Shipping Act of 1916. It is submitted, therefore, that Congress in three successive years, to wit, 1916, 1918 and 1920, declared a policy that merchant ships of the United States should not be entitled to sovereign immunity.

The confirmation of this policy in 1920 was subsequent to the decision by this Court, in the *Lake Monroe* (250 U. S. 246), decided June 2, 1919, so Congress was fully aware of the full legal consequences of its redeclared policy.

The Lake Monroe, 250 U. S. 246, was an action *in rem* for collision damage, against a vessel which had been requisitioned by the President through the Emergency Fleet Corporation and which was documented in the name of the United States and then employed by the President through the Shipping Board and the Fleet Corporation, being assigned to the New England coal trade at a time when the Government was rationing the country as a war measure. This Court held that "Her service at the time was purely commercial, and she was subject by the terms of the Act (of 1916) to the ordinary liability of a merchant vessel, notwithstanding the indirect interest of the Government in the outcome of her voyage" (p. 256) and, therefore, dismissed a petition for prohibition against the District Court which had held

that, because at the time of the collision she was employed solely as a merchant vessel, the *Lake Monroe* was by the terms of Section 9 of the Act of 1916 (39 Stat. 728, 730) subject to arrest on process *in rem*.

It is true that Congress did, by the Suits in Admiralty Act (Act of March 9th, 1920, 41 Stat. L. 525)—approximately three months *before* Congress reaffirmed by the Act of June 5, 1920 (41 Stat. L. 988) for the third time, the policy set forth in Section 9 of the Shipping Act of 1916—declare that United States Government owned or possessed ships should not be subject to seizure under process *in rem* (41 Stat. L. 525). For the usual remedy *in rem,* Congress substituted a remedy *in personam* against the United States Government in cases where, aside from the governmental interest in the merchant vessel, a remedy *in rem* would normally lie.

It is submitted that the Act of March 9th, 1920, cannot be construed as indicating any change of policy, for the following reasons:

1. Three months after the Act of March 9th, 1920 (41 Stat. L. 525), Congress reaffirmed the rule of policy by re-enacting Section 9 of the original Shipping Act in the Section 18 of the Act of June 5th, 1920 (41 Stat. L. 988).

2. The Act of March 9th, 1920 (41 Stat. L. 525) is merely a regulation of procedure, substituting an action *in personam* instituted by notice to the United States Attorney and the Attorney General in place of proceedings *in rem* against the vessel, or *in personam* in proper cases, begun by ordinary Admiralty process.

Nahmeh v. *United States* (*The Quinnipiac*), 267 U. S. 122.

In this case this Court, speaking through the Chief Justice, said, page 124:

> "The Suits in Admiralty Act was passed to provide a suit *in personam* in lieu of the previous unlimited right of suitors to libel merchant vessels belonging to the United States Government *in rem* in the ports of the United States and in its possessions—a right which had proved objectionable."

Shewan & Sons v. *United States*, 266 U. S. 108.

This Court said, pages 111 and 112:

> "This act was enacted chiefly for the purpose of relieving the United States from obstruction to its commercial traffic by the seizure of merchant vessels owned by it or under its control, and was intended to substitute an equivalent remedy against the United States *in personam* for the right *in rem* against the vessel, which the Act of September 7, 1916, Sec. 9, c. 451, 39 Stat. 728, had permitted. *Blamberg Bros.* v. *United States*, 260 U. S. 452, 458, 459."
>
> * * * * * * *
>
> "In view of the purpose of Congress, in the Act of 1920, merely to substitute for an action *in rem* an action *in personam*, the natural construction would be one which, *ceteris paribus*, would measure the extent of the right to sue the United States *in personam* by that which had been granted in the Act of 1916 to sue *in rem* its offending or responsible vessel."

The course of legislation above outlined, it is submitted, clearly shows a recognition by Congress that, by our public policy, merchant ships, by whomever owned and operated, must be amenable to the jurisdiction of our courts under some form of process or other. The legislation shows a recognition of the rule of policy which was announced by the Circuit Court of Appeals, for the Fourth Circuit, in *The Attualita,* 238 Fed. 909. This case involved a claim of immunity on bealf of a ship privately owned, but under requisition by the Italian Government. The Court, in denying immunity, said (p. 911):

> "There are many reasons which suggest the inexpediency and impolicy of creating a class of vessels for which no one is in any way responsible."

See also:

> *Workman* v. *City of New York,* 179 U. S. 552, at 559.

The same thought was expressed years before by Mr. Justice Story in *United States* v. *Wilder,* 3 Sumn. 308; F. C. No. 16,694, in a passage quoted hereafter in Point III.

UNDER THE ITALIAN LAW NO IMMUNITY IS AFFORDED TO MERCHANT SHIPS.

The opinion of an Italian advocate, Avv. Francesco Montefredini, was obtained and appears in the Record beginning at page 13 of the Record. It was stipulated (R., 12):

> "SEVENTH: That the annexed letter of Avvocato Francesco Montefredini may be referred to

> in the brief and argument of either party with the same force and effect as it might be if it were a statement quoted from the textbook of any reputable text writer on the subjects therein discussed."

The letter states quite clearly that under Italian law a merchant ship, whether owned by a foreign sovereign or by the Italian Government itself, is subject to the jurisdiction of the Italian Courts to the same extent as if it were privately owned and operated.

It would certainly seem an anomaly to grant to the *Pesaro* an immunity in our courts which she would not have in her own country and which a similar ship, owned and operated by the United States, would not enjoy either in the United States or in Italy.

POINT III.

A remedy *in rem* in admiralty against the property of a sovereign may quite properly be recognized even though a suit *in personam* would not lie against the same sovereign.

This point was considered by Mr. Justice Story in *United States* v. *Wilder,* 3 Sumn. 308; F. C. No. 16,694. That case involved the right of the Master of a vessel to hold goods belonging to the United States as security for the payment of general average. Mr. Justice Story said:

> "It is said, that, in cases where the United States are a party, no remedy by suit lies against them for the contribution; and hence the conclu-

> sion is deduced, that there can be no remedy *in rem*. Now I confess that I should reason altogether from the same premises to the opposite conclusion. The very circumstance, that no suit would lie against the United States in its sovereign capacity, would seem to furnish the strongest ground, why the remedy *in rem* should be held to exist."

The same result was reached in *The Davis*, 10 Wall. 15. In that case the United States was the owner of a quantity of cotton shipped on board the schooner *Davis*. The schooner met with a disaster and was saved through the services of salvors. Upon reaching the port of New York, the salvors libeled the schooner and her cargo, including the cotton belonging to the United States. The Court held that the salvors were entitled to recover salvage from the property of the United Staes. The Court admitted that (p. 19):

> "* * * the doctrine is well established that no suit can be sustained in which the United States is made an original defendant to be brought into court by process, without some act of Congress expressly authorizing it to be done"

but, despite this doctrine, allowed the salvors to recover *in rem* against the goods. It is, of course, true that the Court based its opinion upon the fact that the goods were not in the possession of the United States at the time process was levied upon them, and the case, therefore, does not go the whole distance of sustaining the process involved in the present case. It does, however, sustain the view that a right *in rem* against property of the United States may exist even though a right of action

in personam against the United States concededly does not exist.

The Santissima Trinidad, 7 Wheat. 283;
The Appam, 243 U. S. 124.

Both of these cases sustained the jurisdiction of our courts over suits *in rem* against prizes of war captured by and in the possession of foreign sovereigns with whom we were at peace. In such cases obviously no suit could have been brought *in personam* against the sovereign, but in both the jurisdiction *in rem* against the property of the sovereign was sustained.

The Siren, 7 Wall. 152.

In that case a Confederate vessel was captured, and while on her way to a port of adjudication in charge of a prize master and crew came into collision with the sloop *Harper.* The owners of the sloop intervened in the Prize Court proceedings and were allowed to recover their damages out of the proceeds of the *Siren* on the theory that the United States by instituting proceedings to condemn the vessel as prize impliedly submitted to the jurisdiction.

This doctrine has recently been still further extended by this Court in *United States* v. *The Thekla,* 266 U. S. 328. In that case the Court held that where a vessel owned and operated by the United States came into collision with a privately owned vessel and the United States invoked the jurisdiction of our courts by suing the privately owned vessel, the courts had jurisdiction to award affirmative relief in Admiralty upon a cross-libel filed by the private owner against the United States.

It is, of course, not argued that any of these cases are controlling of the present suit; they do, however, establish the rule that our courts may have jurisdiction in Admiralty against the property of a foreign sovereign even though there may be no remedy by any personal suit against the sovereign.

The jurisdiction in Admiralty is more extensive in the case of sovereigns than the jurisdiction at law. This is illustrated in *Workman* v. *New York City,* 179 U. S. 552. This was a proceeding *in personam* in Admiralty against the City of New York to recover for damages caused to a British barkentine by collision with the steam fire boat *New York,* which was owned by the City of New York and operated by the Fire Department. It was conceded that by the common law of New York the City of New York would not be liable for damage caused by its Fire Department. This Court, however, held that the maritime law governed; that by the Admiralty law a municipal corporation was subject to the jurisdiction of the court and could be held liable for its maritime torts in the same way as a private corporation. The decision allowed a recovery *in personam* against the City even though there might be no right *in rem.* While the case is not directly in point in the present case, it illustrates the rule that either a right *in rem* or a right *in personam* may exist independent of the other, and the further rule that the maritime law is independent to a certain extent of municipal law.

POINT IV.

Explanation of the English law.

The respondent will doubtless point out that in England ships belonging to a foreign sovereign (even ships operated by the Shipping Board) are immune from process of the courts. It must be remembered that the conception of a maritime lien in England is quite different from the conception in this country. In England it is considered to be a *jus ad rem* while in America it is held to be a *jus in re.* See *The Young Mechanic,* 2 Curtis 404, F. C. No. 18,180. The difference is fundamental and is well illustrated by the reasoning of the Court of Appeal in *The Parlement Belge* (1880) 5 Prob. 197, the leading case in England upon the general question of sovereign immunity in admiralty. In fact that case is the very foundation of all the later English decisions upon the subject. It is, therefore, highly important to note the theory upon which it and the cases following it were decided. This theory is stated at length by the Court in the *Parlement Belge, supra,* on page 217, to be that an action *in rem* is "a proceeding directly or indirectly impleading the owner of the property", who, being a sovereign in these cases, cannot be forced to submit to the jurisdiction of a foreign court. The Court said on page 217:

> "But we cannot allow it to be supposed that in our opinion the owner of the property is not indirectly impleaded. * * * (p. 218). In a claim made in respect of a collision the property is not treated as the delinquent *per se.* Though the ship has been in collision and has caused in-

> jury by reason of the negligence or want of skill of those in charge of her, yet she cannot be made the means of compensation if those in charge of her were not the servants of her then owner, as if she was in charge of a compulsory pilot."

This clearly shows that the English concept of a maritime lien differs from the American theory. This difference has been noted and accepted by our Courts. Thus in

Homer Ramsdell Co. v. *C. G. T.*, 182 U. S. 406, this Court remarked (p. 413):

> "* * * In England it is held that the ship is not responsible in Admiralty, where the owner would not be at common law, *differing in this respect from our own decisions.*" (Italics are ours).

Also in

The Eugene F. Moran, 212 U. S. 466, 474:

> "No doubt the fiction that a vessel may be a wrongdoer and may be held, although the owners are not personally responsible on principles of agency or otherwise, is carried further here than in England."

One example of this point is that in England the vessel is not liable for torts committed while in charge of a compulsory pilot (*The Maria*, 1 W. Rob. 95, and many others) whereas in this country the vessel is held responsible. *The China*, 7 Wall. 53, and others.

The English theory, it will thus be seen, is that a right *in rem* is only a power in the creditor to have the debtor's

res sold in order to have the claim paid out of the proceeds. In other words, the ship is merely considered as security for the owner's liability. On the other hand in this country a right *in rem* is considered as a *jus in re* rather than a *jus ad rem*. *The Young Mechanic*, 2 Curtis 404; F. C. #18180. As was said in *The John G. Stevens*, 170 U. S. 113, 120:

> "The ship, by whomsoever owned or navigated, is considered as herself the wrongdoer, liable for the tort." (Compare this with the statement in the *Parlement Belge*, *supra*, at p. 217, that "the property is not treated as delinquent *per se*.").

Also see

Brig Malek Adhel, 2 How. 210, 233.

CONCLUSION.

The decree of the District Court should be reversed.

May, 1926.

Respectfully submitted,

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Supreme Court of the United States.

BERIZZI BROTHERS COMPANY,
Appellant,

AGAINST

The Steamship "PESARO", her Engines, Boilers, etc.,

and

DON GELASIO CAETANI, Royal Italian Ambassador.

October Term, 1925,
No. 334.

BRIEF FOR THE "PESARO" AND FOR HER CLAIMANT, THE ROYAL ITALIAN AMBASSADOR.

The appellant is here complaining of a final decree of the District Court of the United States for the Southern District of New York, sitting in Admiralty, which dismissed a libel *in rem* against the steamship "Pesaro" on the sole ground that the court lacked jurisdiction to entertain the same.

The Suit.

The libel was filed by a private domestic corporation against the steamship "Pesaro", as a common carrier, for the recovery of damages therefrom alleged to have resulted from the breach of a contract made in Genoa, Italy, between a duly authorized agent of the vessel and the libellant, whereby it was agreed by said agent that said vessel should carry certain merchandise, viz., 75 cases of artificial silk, then and there shipped aboard said steamer, to New York and there deliver the same to the libellant. The libel alleged the subsequent

arrival of the steamer at New York and its failure to deliver the merchandise on libellant's demand therefor, in consequence of which, it claimed, it had suffered the damages prayed for (Record, p. 2).

A monition was issued from the court pursuant to the libellant's prayer for process *in rem* (p. 3) and the vessel was taken into custody (p. 6) but was subsequently released on a stipulation for value, given by the Master, as special claimant, and the National Surety Company, and conditioned that if the vessel should thereafter be held to be immune from suit such bond should be void but otherwise should remain in full force and effect until the amount of any decree entered in the suit should be paid (p. 7).

There followed certain proceedings in connection with an unsuccessful attempt of the Master as special claimant to raise the question of the vessel's public status and immunity from suit, which for the purposes of this appeal are quite immaterial and call for no further consideration.

Subsequently, Don Gelasio Caetani, Royal Italian Ambassador, intervening for the interest of the Royal Italian Government in the said vessel as owner thereof, applied to the court for permission to file a claim to said steamer without waiver of, or prejudice to, his right to raise in said suit the sovereign immunity of the vessel from the process of the court and its freedom from all liens, including the one asserted in the libel. This application was granted (p. 5) and the Ambassador's claim was thereafter duly filed in keeping with the practice approved of by this Court in *Ex Parte Muir,* 254 U. S. 522.

The claim of the Ambassador, which was by him duly subscribed and sworn to, alleged that the "Pesaro" was at all times mentioned in the libel the property of the Royal Italian Government and in its possession; that his sovereign had never consented that the said steamship might be seized or proceeded against by judicial process or that such sovereign might be sued in respect to said steamer; and that his purpose in appearing in the suit in his said capacity was to establish the immunity of the steamer from seizure or

detention under the process of the Court and its freedom from all liens, including the particular one asserted in the action (p. 6).

Subsequently the Ambassador filed his answer, admitting the shipment of the merchandise aboard the "Pesaro", the contract of carriage as alleged and the non-delivery of the goods, but denying that the "Pesaro" was a common carrier, denying the jurisdiction of the court and affirmatively alleging as a complete defence that the "Pesaro" at all times mentioned in the libel had been and then was "owned by, and in the sole possession of, the Royal Italian Government and by, and for the sole use and benefit of, said Government" had, at all said times, been and then was "employed in the carriage of merchandise for hire between various ports in Italy, on the one hand, and various ports of the world lying outside Italy, including the port of New York, on the other hand"; that the said steamer at all said times had been and then was "entirely outfitted, manned, equipped and controlled by the Royal Italian Government and its entire employment was and is in and for the service and interest of the whole Italian nation as distinguished from that of any individual member thereof, private or official"; that without its consent "neither the Royal Italian Government nor its property is subject to being sued or proceeded against judicially in Italy or elsewhere by libel or otherwise and it has never consented that the said steamship be seized or proceeded against by judicial process or that the Royal Italian Government be sued in respect thereto"; and that in consequence "no lien arose against the steamship 'Pesaro' in favor of the libellant as a result of any or all of the events set forth in the said libel and the said steamship" was "immune from the process" of the Court "in keeping with the principles of international law and the peace and dignity of nations" (pp. 10-11).

The Facts.

Thereafter the cause came on for trial. All of the evidence submitted at the trial consisted of a stipulation of facts.

From this stipulation it appeared:

(1) That the "Pesaro" was owned solely by the Kingdom of Italy and was registered in the name of the Ministry for Railway and Maritime Transportation, a department of the Royal Italian Government whose head is a member of the Italian Cabinet, which department, however, is a different department from that having charge of naval and military affairs;

(2) That the "Pesaro" was in the possession solely of the Royal Italian Government, being manned by a master, officers and crew employed by and under the direction of the Ministry for Railway and Maritime Transportation and paid by it and, although the "Pesaro" was not carried on the roster of the Italian Navy and its master, officers and crew were not connected with or under the orders of the Italian naval or military forces, nevertheless the ownership and possession of the steamer was in the Royal Italian Government *for the sole use and benefit of said Government.*

(3) That the "Pesaro" was employed in *the carriage of merchandise for hire* between various ports in Italy on the one hand, and other ports of the world, including New York, on the other hand, and, although not functioning in a naval or military capacity nor under the immediate direction of the departments having to do with naval or military affairs, nevertheless the steamer was entirely outfitted, manned, equipped and controlled by the Royal Italian Government and *its entire employment*

was in and for the service and interest of the whole Italian nation as distinguished from that of any individual member thereof, private or official;

(4) That the Royal Italian Government *has never consented* that the said steamship be seized or proceeded against by judicial process or that the said Government be sued in respect thereto in a cause of the kind stated in the libel or otherwise;

(5) That Don Gelasio Caetani, the claimant of the "Pesaro", was the then duly accredited and recognized Ambassador, Extraordinary and Plenipotentiary of the Royal Italian Government in and to the United States of America;

(6) That the loss and damage for which the libellant would be entitled to a decree if the court had jurisdiction was $250; and

(7) That a letter received by libellant's counsel from a private Italian lawyer of Naples, Italy, and attached to the stipulation should have the same force and effect as a quotation from the text book of any reputable text writer on the subject therein discussed, viz., the state of the Italian law on the subject of the arrest of government-owned property.

On these facts the District Court concluded that it was without jurisdiction to proceed against the vessel and dismissed the libel.

The Question Presented.

The precise question presented for review on this appeal is whether Chapter 20 of the Act of 24 September, 1789 (1 Stat. L 76) as now found in the Judicial Code (§ 24, cl. 3) conferring Admiralty and Maritime jurisdiction on the District Courts of the United States includes, in its grant of

power, jurisdiction to proceed *in rem* against a vessel of the type of the "Pesaro"; whether the "Pesaro" under that grant of jurisdiction was subject to a maritime lien.

The Pesaro, 255 U. S. 216, 218;
The Carlo Poma, 255 U. S. 219, 220.

The question thus presented is materially different from the question whether the "Pesaro", when in the port of New York, was subject to the *local jurisdiction*.

Tucker v. *Alexandroff*, 183 U. S. 424, 441-442, 440-441, 446, 463.

POINT I.

At the time of the adoption of the Act of 24 September, 1789, it was a principle of law accepted among all civilized nations that sovereignty was not subject to suit and it was recognized and agreed by the founders that grants of jurisdictional power embodied in the Federal Constitution should, in their construction, be limited accordingly.

Vattel, writing in 1758, said:

> "Since Nations are composed of men who are by nature free and independent, and who before the establishment of civil society lived together in the state of nature, such Nations or sovereign States must be regarded as so many free persons living together in the state of nature.
>
> * * * the whole body of the Nation, the State, so long as it has not voluntarily submitted to other men or other Nations, remains absolutely free and independent."
>
> Vattel, Bk. I, § 4.

And this general principle applied to princes traveling abroad as well as when within their own borders (Vattel, Bk. IV, § 108).

Hamilton said, in arguing for the adoption of the Constitution:

> "It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*. This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union."
>
> *The Federalist*, No. 81.

Madison, arguing before the Virginia Convention for the adoption of the Constitution, said:

> "It is not in the power of individuals to call any State into court. * * * if a State should condescend to be a party, this court may take cognizance of it."
>
> 3 Elliott's Debates, 2nd ed. 533.

And Marshall, who was later to write his famous opinion in the case of *The Exchange*, 7 Cranch. 116, in arguing to the same effect on the floor of the Virginia Convention, said:

> "It is not rational to suppose that the sovereign power should be dragged before a court."
>
> 3 Elliott's Debates, 2nd ed. 555.

> "The suability of a State without its consent was a thing unknown to the law. This has been so often laid down and acknowledged by courts and jurists that it is hardly necessary to be formally asserted."
>
> *Hans* v. *Louisiana*, 134 U. S. 1, 16.

The idea of the non-suability of a sovereign power was so firmly fixed in the founders' minds that when *Chisholm* v. *Georgia*, 2 Dall. 419, announced a contrary doctrine in the interpretation of the Constitutional grant to the United States of judicial power over controversies "between a State and citizens of another State" (Constitution, Art. III, Sec.

2), there was an immediate and decisive popular reversal of the decision through the adoption of the Eleventh Amendment of the Constitution.

Hans v. *Louisiana, supra,* p. 11.

The Eleventh Amendment has been pronounced, therefore, only declaratory of the principles to be applied generally in the construction of the Constitutional grants of jurisdiction.

Hans v. *Louisiana, supra,* p. 15;
Ex Parte State of New York, No. 1, 256 U. S. 490, 497.

An express grant of jurisdiction over cases between States and citizens of other States thus requiring to be construed so as to *exclude* from the express language cases of States sued without their consent, *a fortiori* such jurisdiction so to proceed against sovereignty will not be *implied* from a mere general grant of jurisdiction.

Ex Parte State of New York No. 1, supra, p. 497.

POINT II.

The principle of the non-suability of a sovereign power was also at the time of the adoption of the Judiciary Act considered as extending to the sovereign's property.

The exemption of a sovereign from suit was recognized as extending to "a ship of war *or vessel belonging to a sovereign independent state*". (Italics ours.)

Moitez v. *The South Carolina,* Bee, 422, 17 Fed. Cas. 574, Case No. 9,697.

And that, too, whether the sovereign was foreign or domestic.

The Exchange, 7 Cranch. 116.

POINT III.

The Grant of the Admiralty and Maritime Jurisdiction of the United States to the District Courts in 1789 has ever since been narrowly construed and never extended by implication to cover a sovereign or his property.

A. IT HAS BEEN CONSTRUED AS EXCLUDING JURISDICTION OVER SUITS BROUGHT, IN THE ABSENCE OF CONSENT, AGAINST SOVEREIGNS IN PERSONAM.

1. Suits against the United States.
   Blamberg Bros. v. *United States*, 260 U. S. 452;
   The Isonomia, 285 Fed. Rep. 516.

2. Suits against States of the Union.
   Ex Parte State of New York, No. 1, 256 U. S. 490;
   Ex Parte Madrazzo, 7 Pet. 627, 632.

B. IT HAS BEEN CONSTRUED AS EXCLUDING JURISDICTION OVER SUITS BROUGHT IN THE ABSENCE OF CONSENT AGAINST THE PROPERTY OF SOVEREIGNS.

1. Property of the United States.
   The Othello, 5 Blatchf. 342, 18 Fed. Cas. 901, Case No. 10,611, holding a cargo of ordnance and ammunition belonging to the United States not suable *in rem* at the instance of the holder of a bottomry bond, although not in the possession of the Government when the bond was given or suit was commenced, and affirming on this point *Cartwright et al.* v. *The Othello*, 1 Ben. 43, 5 Fed. Cas. 231, Case No. 2483;
   The Thomas A. Scott, 90 Fed. Rep. 746;
   The Western Maid, 257 U. S. 419.

2. Property of the States of the Union.
   Ex Parte State of New York, No. 2, 256 U. S. 503, 510-511.

3. Property of municipal corporations.

The Fidelity, 16 Blatchf. 569, 8 Fed. Cas. 1,189, Case No. 4,758;

The Seneca, 8 Ben. 509, 21 Fed. Cas. 1,080, Case No. 12,668;

The Protector, 20 Fed. Rep. 207;

The John McCraken, 145 Fed. Rep. 705.

4. Property of foreign sovereigns.

The Exchange, 7 Cranch, 116;

The Pizarro, 10 N. Y. Leg. Obs. 97, 19 Fed. Cas. 786, Case No. 11,199;

The Pampa, 245 Fed. Rep. 137;

The Maipo, 252 Fed. Rep. 627;

The Maipo, 259 Fed. Rep. 367;

The Carlo Poma, 259 Fed. Rep. 369, reversed on another point by this Court in *The Carlo Poma*, 255 U. S. 219;

The Imperator, 1924 A. M. C. 596;

Nevada, ex Rogday, 1926 A. M. C. 531.

C. THE JURISDICTION *in rem* GRANTED BY THE ACT, EVEN AS AGAINST THE PROPERTY OF PRIVATE PERSONS, HAS BEEN CONSTRUED MOST STRICTLY.

The question whether there is a right to a lien as such is a jurisdictional question.

The Western Maid, 257 U. S. 419;

The Ira M. Hedges, 218 U. S. 264;

The John McCraken, 145 Fed. Rep. 705, 709.

The maritime lien is a secret lien, not favored in the law and therefore *stricti juris*. Therefore, even as against private property, it "cannot be extended by construction, analogy, or inference."

Osaka Shosen Kaisha v. *Lumber Co.*, 260 U. S. 490;

The Yankee Blade, 19 How. 82.

There being no recorded instance of its ever having been created or enforced against public property, prior to the adoption of the Judiciary Act, the implication of such a priv-

ilege therefrom at this late date, to the impairment of sovereign power, is not warranted.

The Western Maid, supra.

D. AND AS AGAINST THE PROPERTY OF SOVEREIGNS IT WILL NOT BE IMPLIED.

The maritime lien against private property grows out of the fiction or implication of the impersonation of the *res*.

The John G. Stevens, 170 U. S. 113, 120.

But this impersonation has never been implied in the case of a sovereign's property. His property is merged in his personality.

The Western Maid, supra.

To give personality to the inanimate things of a sovereign is to plague his sovereignty and create division in his household. So far from impersonalizing his lifeless property, courts have universally depersonalized his living agents and instrumentalities. So they can do nothing to bind their sovereign by speech or act and so far as the creation of obligations against him are concerned are lifeless. It is obviously poor reasoning, therefore, to say that courts, that to protect sovereignty have depersonalized living things, will, in the treatment of his lifeless instrumentalities, impersonalize them and thus impose upon their sovereign owner a legal responsibility for wrongs that of course *they* could not have committed.

The Western Maid, supra.

So the principle results that "any action against the property of a foreign sovereign is an action or proceeding against such person".

The Jupiter (C. A.) (1924), P. 236, 243.

To construe the Admiralty and Maritime Jurisdiction of the District Courts as embracing rights *in rem* against the sovereign's property would violate a basic rule of statutory construction; viz., that general words of a statute shall not be construed to the prejudice of the sovereign.

United States v. *Herron,* 20 Wall. 251.

POINT IV.

The legislative history of the United States confirms the exclusion, from the Admiralty and Maritime Jurisdiction of the District Courts, of any remedies *in rem* against the public property of a sovereign power.

The Tucker Act (Act of 3 March, 1887, Ch. 359, § 1, 24 Stat. 505) gave a limited right of redress against the United States in maritime causes. But this was held to confer upon private suitors no right to process *in rem*.

The United States v. *Morgan*, 99 Fed. Rep. 570, 573;
United States Shipping Company v. *United States*, 146 Fed. Rep. 914, 919.

In the Act of 7 September 1916, Ch. 451, § 9, Congress did however extend the Admiralty and Maritime Jurisdiction of the District Courts to the extent of giving them power to issue process *in rem* against a limited class of public ships, viz., merchant or trading ships; only, however, when chartered or leased to private persons.

This very limited grant of *in rem* jurisdiction to the District Courts over public vessels was recognized at the time to be novel, "a most material restriction" and one but for which such vessels, like all other public property, would remain inviolate from the *in rem* process of the Admiralty Courts.

The Lake Monroe, 250 U. S. 246, 255, 249;
Id., 258 Fed. Rep. 77, 78;
The Florence H., 248 Fed. Rep. 1012, 1014.

This novel experiment in the subjecting of the sovereign's property, even to the limited extent thus provided for, soon proved so "objectionable" and "embarrassing" to the United States that Congress hastily repented of its action and altogether withdrew from the District Courts such limited *in rem*

jurisdiction over the sovereign's merchant ships (Act of 9 March, 1920, Ch. 95, 41 Stat. 525).

Blamberg Bros. v. *United States*, 260 U. S. 452, 458;
Shewan & Sons v. *United States*, 266 U. S. 108, 111;
Nahmeh v. *United States*, 267 U. S. 122, 124;
The Isonomia, 285 Fed. Rep. 516, 519.

The Act of 9 March, 1920, confined the *in rem* jurisdiction of the District Courts within its old channels and reasserted the freedom from its influence of the sovereign's merchant ships.

Indeed the reaction resulting from what had proved to be an unwise extension of the jurisdiction in 1916 was so unfavorable that Congress declared, in Section 1 of the Act of 9 March, 1920, not only that such merchant ships were not subject to suit *in rem* but also that the cargoes thereon were likewise exempt; that these classes of property were immune from the process of the Admiralty Courts, even if the sovereign had the possession alone, without the ownership, of the vessel; and that the same result would follow even although the ownership or the possession of the vessel was in a corporation agent of the sovereign that itself had previously been and still continued to be subject to process *in personam* (*Sloan Shipyards* v. *U. S. Fleet Corp.*, 258 U. S. 549).

Thus it would seem that Congress by virtue of the Act of 9 March, 1920, besides restricting the admiralty jurisdiction of the Federal Courts to its former bounds, went still further and deprived those Courts of a measure of admiralty and maritime jurisdiction possessed by them prior to 7 September, 1916. For it had been previously held that when the sovereign becomes a stockholder in a corporation, the latter (and presumably its property as well) does not become possessed of the attributes of sovereignty (*United States Bank* v. *Planters' Bank*, 9 Wheat. 904).

In any event the novel experiment of subjecting the sovereign's public merchant ships to arrest had so opened the eyes of Congress to the danger and embarrassment of such

a course that it called the particular attention of the appropriate officers of the Executive Department of the Government to the matter of their claiming immunity for those vessels when proceeded against abroad and redeclared their full authority to proceed to that end.

Act of 9 March, 1920, Ch. 95, § 7;
Blamberg Bros. v. *United States, supra,* p. 459.

In taking back from the Admiralty Courts the very limited jurisdiction *in rem* that had been given them over public merchant or trading ships, Congress gave them a limited jurisdiction *in personam* against the sovereign, somewhat more extensive than the powers of that kind already possessed by the District Courts under the Act of 3 March, 1887, *supra.* But the extension of this personal jurisdiction of the Admiralty Courts calls for no further consideration in connection with the question here presented for review.

POINT V.

It follows from the judicial and legislative history of the United States as set forth in the foregoing points that the "Pesaro", a public merchant ship of a foreign sovereign, is exempt from the process *in rem* of the District Court.

The general principle to be derived from the cases and statutes cited in the foregoing points, is, we think, that any property owned or possessed by a sovereign power in the interests of all the people represented by, or constituting, that sovereign is immune from the process *in rem* of the Admiralty and Maritime jurisdiction of the United States District Courts. Whether purely private property of a personal sovereign enjoys a similar immunity is a question that does not call here for a solution any more than it did in *The Exchange, supra,* p. 145.

Property not owned by a sovereign, either generally or *pro hac vice,* even although employed in the performance of services of a public nature, is not, it would seem, within the immune class.

The Othello, 5 Blatchf. 342, 18 Fed. Cas. 901, Case No. 10,611;
Goodwin v. *United States,* 17 Wall. 515, 516-517;
The Attualita, 238 Fed. Rep. 909.

And in this apparently non-immune class, it is to be noted, the "Gleneden" fell in *Ex Parte Muir,* 254 U. S. 522, although a decision on the point was found to be unnecessary.

Why should not the subjectivity of a sovereign's property to the *in rem* process of our Admiralty courts depend upon the question whether at the time of suit the same is owned generally by him, or, if not owned generally, at least owned *pro hac vice* as a result of being in his possession? Title and possession are two legal concepts that in our system of law lie at the very base of all other property rights, responsibilities and immunities. If a sovereign is deprived of his title in property, he suffers; so, if he be disturbed in his possession. Either sort of deprivation impairs his dignity, denies his sovereignty, and pushed far enough would destroy it entirely.

"To permit a creditor to seize and sell" such property, said Mr. Chief Justice Waite, is "to permit him in some degree to destroy the government itself" (*Klein* v. *New Orleans,* 99 U. S. 149, 150).

> "To allow such a lien (a maritime lien) to attach would be * * * to create a *jus in re aliena,* a subtraction from the absolute property of the sovereign state" (*The Terraete* (C. A.) (1922), P. 259, 267).

But when a *res* is merely being employed to render public service in the possession of a private person, pursuant to some contract with the sovereign, no such difficulty exists.

Goodwin v. *United States, supra;*
New Orleans-Belize S. S. Co. v. *United States,* 239 U. S. 202, 206;

Ackerlind v. *United States*, 240 U. S. 531, 536-537.
Gromer v. *Standard Dredging Co.*, 224 U. S. 362, 371;
Morgan v. *United States*, 14 Wall. 531.

If at any time the sovereign feels that he does wish to protect some particularly precious and private-owned property being used in his service by a private person, he has his remedy by taking over the title or the possession; to do which he is possessed of sovereign means. So, to hold mere public service not a proper test of immunity can obviously cause no hardship. On the other hand, to upset the determinative character, for purposes of rights *in rem*, of possession and ownership, is to desert old land-marks that have proved entirely safe and trustworthy guides in the past and follow a lead that, because of the very vagueness and indefiniteness of the term "public service", apart from the substantial considerations above discussed, may take us into endless confusion, uncertainty and woe.

Certain cases may, at first blush, seem to be contrary to this rule, viz.:

The Siren, 7 Wall. 152;
The Davis, 10 Wall. 15;
Long v. *The Tampico*, 16 Fed. Rep. 491;
United States v. *Wilder*, 3 Sumn. 308;
The Johnson Lighterage Co., No. 24, 231 Fed. Rep. 365.

But they are not. *The Siren* involved, as pointed out in *The Western Maid*, *supra*, the consent of the sovereign.

The Davis involved merely the right of a bailee to retain property entrusted to his care until his charges were paid; as did also *Wilder* v. *United States*.

In *Long* v. *Tampico* neither the ownership nor the possession of the sovereign was established.

And *The Johnson Lighterage Co., No. 24*, was like *The Davis* in principle, for the lighter of the bailee, on which the sovereign's property was being carried, was salved along

with the cargo. It followed that the bailee was entitled to retain the cargo in his custody until its due share of salvage or general average charges was paid.

The argument made by the appellant's counsel at pages 7 to 21 of their brief is to the effect that the property of a sovereign to be entitled to immunity from the jurisdiction must be employed in the pursuit of a national object. That contention may be correct, although Mr. Chief Justice Marshall was careful to refrain from passing an opinion on the point in *The Exchange, supra*, p. 145. There is no more necessity for the decision of that point in this case than in that. The "Pesaro", it is stipulated, was owned, possessed and operated "for the sole use and benefit" of the Royal Italian Government; and "its entire employment was in and for the service and interest of the whole Italian nation as distinguished from that of any individual member thereof, private or official" (Record, p. 12). Hence the "Pesaro" was necessarily employed in the pursuit of public purposes or national objects; just as is any of the merchant vessels owned and operated as such by the United States.

National objects embrace many ends other than those of war and peace. To promote the general welfare is universally regarded as a national object and is specifically mentioned in the preamble of the Constitution as one of the six great national aims that the founders had in view in drafting that instrument. And, to demonstrate the utility of a flourishing foreign commerce to aid in the accomplishment of that end, argument is unnecessary.

> "* * * as a Nation is helped by its commerce, it owes to itself the duty of making it flourish.
>
> For a like reason drawn from the good of the State, and also for the purpose of obtaining for the citizens whatever they stand in need of, a Nation is obliged to carry on and to assist foreign trade."
>
> Vattel, Bk. I, §§ 86-87.

The National character of the objects that a public, government-owned, merchant marine is calculated to procure

was recognized by Congress in enacting the law providing therefor, as those objects are set forth in the preamble of that Act. To say that the object of such a fleet is private and not public, is to disregard the most fundamental distinctions. Obviously any interest designed to promote the welfare of people, not as individuals, but as members of the public, is a public, not a private interest.

If a vessel "belongs to the representative of the public it is public" (*Title Guarantee & Trust Co.* v. *Crane Co.*, 219 U. S. 24, 33) and its freedom from civil process in courts generally follows, even although it be incomplete and not yet delivered to the possession of the representative of the public (*United States* v. *Ansonia Brass, etc., Co.*, 218 U. S. 452); a principle that this Court has recognized as equally true in the case of a foreign sovereign (*Tucker* v. *Alexandroff*, 183 U. S. 424, 440, 441, 463).

Those cases distinguishing between the public and private activities of municipalities cited at pages 18 *et seq.* of appellant's brief are not here in point. The municipality's sovereignty is so limited that it is useless, if not impossible, to compare it with a sovereign power. Such little sovereignty as the municipal corporation has is delegated to it by the State to be exercised in its community on behalf, or as agent, of the State; while at the same time, as a corporation, it has many powers of a non-sovereign nature. *i. e.*, having no relation to the residents of the municipality as members of the State public. A distinction between the Municipality's activities in exercising those respective classes of powers is necessarily drawn. In exercising one class, it is sovereign; in exercising the other, it is a private person. In one case it is entitled to all the dignities of sovereignty; in the other, to none.

But a real sovereign, a state, a Nation, is always sovereign. In none of its activities is it ever subject to a higher human will, individual or collective. Hence, to say (so long as personal sovereigns are not in question) that a true sovereign can ever act in a capacity other than public, is a

solecism. True enough, it may do things that a private citizen ordinarily does, but the character of the thing done depends not upon *its* nature but upon the character of the *actor* that does it.

The case of *Horowitz* v. *United States,* 267 U. S. 458, cited on page 19 of appellant's brief is not to the contrary. That case holds instead simply that, where a sovereign consents to be sued, he enjoys, when so sued, rights equal to, and no different from, those of private litigants.

A municipality, unlike a true sovereign, may be sued *in personam* (*Workman* v. *New York City,* 179 U. S. 552); but even a municipality's vessels are immune from Admiralty process *in rem* (*supra,* p. [illegible] 10

The case of *South Carolina* v. *United States,* 199 U. S. 437, cited on page 17 of appellant's brief, does not purport to make a distinction between the private and the public exercise of a State's power in respect to those matters wherein the State is sovereign and independent of the Federal Government. There a State, which had established a liquor dispensary system, sought to recover from the United States license taxes collected from its dispensers by the Commissioner of Internal Revenue. It was an attempt, in other words, by a State to withdraw from the Federal taxing power a source of revenue secured to it by the Constitution. This it was held, the State could not do, because of its delegation of sovereignty or supremacy to the National Government in the matter of the license taxes. It was no longer sovereign in that field; and therefore, while it could undertake the business of liquor-selling, it could not by so doing impair the sovereignty of the Federal Government in respect to the taxing of that business. The distinction made in the case of municipalities was adverted to, not as affecting the sovereignty of the State in the transaction of the business of liquor-selling, but as furnishing a convenient line of demarcation as between the conflicting powers of State and Nation in the dual role cast for them by the Constitution.

The unquestioned right of the State to take over as State business the sale of liquor within its borders had previously been recognized in *Vance* v. *W. A. Vandercook Company,* (No. 1), 170 U. S. 438, 444, where it was said:

> "Beyond dispute the respective States have plenary power to regulate the sale of intoxicating liquors within their borders, and the scope and extent of such regulations depend solely on the judgment of the law-making power of the States * * *."

On reasoning quite to the same effect as that underlying the decision in *South Carolina* v. *United States, supra,* vessels owned and employed by the State of Maryland in the supervision of the oyster industry were held subject to seizure by the United States, which was sovereign and supreme in that field.

> *The Oyster Police Steamers of Maryland,* 31 Fed. Rep. 763.

The guarded reference made by Mr. Chief Justice Marshall in The Exchange to certain property that might possibly not be immune from the process of our Admiralty Courts referred to the private property of "the person who happens to be a prince"; not to the public property of a great Nation used in the interest of all the people of the realm. Hence there is nothing in that great jurist's opinion as quoted on page 7 of appellant's brief pointing to the conclusion that Mr. Chief Justice Marshall meant to indicate that a sovereign's property, to be exempt in the years to come, would have to be engaged in a public business of a kind that had been generally treated as public in 1789.

For a court to say to the United States, or to a sovereign State of the Union acting with due regard to the powers granted to the United States, or to a foreign sovereign state, that property that it (the sovereign power) has undertaken to own and possess in the interest of all its people is not properly public and ought to have been left in private ownership and possession and must be dealt with just as though it

had been left in private ownership and possession, is to do the very thing that the restricted grant of Admiralty and Maritime jurisdiction was designed to avoid, viz., to impair the dignity due to a sovereign power and to deny its supremacy.

But even if an Admiralty Court is justified, despite the stipulation of the parties, in going into the question whether the Italian sovereign was entitled to enter the carrying trade in the interest of the whole public, still there can be no doubt that the question must be answered in the affirmative.

The government-owned merchant ships of the United States have been recognized to be public property engaged in public business and requiring to be immune from Admiralty process *in rem*.

> *The Lake Monroe*, 250 U. S. 246, 255, 249, *supra;*
> *Id.*, (D. C.), 258 Fed. Rep. 77, 78, *supra;*
> *Blamberg Bros.* v. *United States*, *supra*, 458;
> *Shewan & Sons* v. *United States*, *supra*, 111;
> *The Nahmeh*, *supra*, 124;
> *The Florence H.*, *supra*, 1014;
> *The Isonomia*, *supra*, 519.

The government-owned merchant ships of foreign powers have been held to be public ships and immune from the process *in rem* of our Admiralty Courts.

> *The Maipo*, 252 Fed. Rep. 627, *supra;*
> *The Maipo*, 259 Fed. Rep. 367, *supra;*
> *The Carlo Poma*, 259 Fed. Rep. 369, reversed on another point in *The Carlo Poma*, 255 U. S. 219, *supra;*
> *The Imperator*, 1924 A. M. C. 596;
> *The Pietro Gori*, (D. C. E. D. N. Y., 1924; unreported), holding Italian Government-owned merchant ship not subject, on coming into private hands, to maritime lien for damage caused by her while owned and operated by the sovereign.

Government-owned merchant ships have been held to be public ships and not subject to admiralty process *in rem* in the other leading commercial nations of the world.

(1) In England.

The Parlement Belge, L. R. 5 P. D. 197;
Young v. *The Scotia* (Privy Council) (1903), A. C. 501;
The Jassy (1906), P. 270;
The Gagara (C. A.) (1919), P. 95;
The Porto Alexandre (C. A.) (1920), P. 30;
The Tervaete (C. A.) (1922), P. 259;
The Jupiter (C. A.) (1924), P. 236.

These English cases of government-owned merchant ships, it is to be noted in passing, occupy a position midway between two other well-recognized class of vessels held immune by the Admiralty Courts of England from their process. The first class consists of war ships and other naval or military boats, regardless of the particular work they may be engaged in at the time when process is prayed for, of which class the following cases are instances:

The Constitution, L. R. 4 P. D. 39;
The Athol, 1 Wm. Rob. 374;
The Prins Frederik, 2 Dod. 451.

The second class consists of the government-owned merchant vessels above referred to.

And the third class consists of vessels not owned by the sovereign either generally or *pro hac vice,* but employed in performing services of a public nature. Instances of this class are:

The Broadmayne (1916), p. 64;
The Messicano, 32 T. L. R. 519;
The Erissos, Lloyd's List, 24 Oct., 1917;
The Crimdon, 35 T. L. R. 81.

In the United States the jurisdiction of our Admiralty Courts is considered to be quite extensive enough to embrace the third class of vessels, as pointed out *supra* (p. 15). The decision rendered in *The Roseric*, 254 Fed. Rep. 154, is the sole American decision granting immunity to vessels owned neither generally nor *pro hac vice* by a sovereign and would seem perhaps to have gone too far through the emphasizing of considerations of a political rather than a jurisdictional nature.

The general American practice was that followed formerly in England (The Marquis of Huntley, 3 Hagg. Adm. 246, as interpreted and approved of in the Parlement Belge, 5 P. D. 197, 212).

(2) In Germany.

Von Hellfield v. *Russian Government*, 5 Am. J. Int. L., 490;

Salling v. *United States Shipping Board* (*S.S. Ice King*), Hanseatische Gerichtszeitung (Hauptblatt) (1921), 85, 110.

(3) In France.

Lambiege & Pujol v. *Spanish Government* (1849) Dalloz I, 5;

The Englewood, Clunet (1920), 621.

The letter of the Italian lawyers attached to the stipulation of facts, when carefully read, will be seen not to establish a contrary practice for Italy. At best it would only be evidence to show that Italy had consented to have the "Pesaro" sued in this proceeding. But the contrary has been conclusively established by the express words of the stipulation. And that fact negatives the idea of any general consent of Italy to the inauguration of such proceedings against its other ships of like kind.

If it be objected that sovereign states may nationalize whole fleets of merchant ships and that it will be inconvenient to our citizens to have no redress against them *in rem*, it is a sufficient answer to point out that Congress may at any time,

by virtue of its power to regulate foreign commerce, extend the Admiralty and Maritime jurisdiction of the Federal Courts to include process *in rem* against such ships, either with or without the assent of other nations first procured by diplomatic means.

And in this connection it is interesting to note that in the Treaty of Versailles of 1919 (Art. 289) a clause was inserted providing that in the case of German government-owned merchant ships no such immunity would be claimed or granted.

(*The Pesaro,* 277 Fed. Rep. 473, 484.)

Any such objection, if it really be an objection, is therefore susceptible of being cured by easy and regular means. And, even if left uncured, we can not conceive of its being even comparable in possibilities of harm with the remedy that appellant proposes, which would at one and the same time overturn the well-ordered development of the fundamental principles of our Admiralty and Maritime jurisprudence and provide a means and countenance a method for the waging by disaffected citizens in our courts in the generations to come of endless controversies with foreign powers and potentates, leading to the certain embarrassment of our national government, to constant friction with its sovereign neighbors and quite possibly even to war.

POINT VI.

Courts other than those of Admiralty have construed their various jurisdictions as likewise excluding any power to issue process against the persons of sovereigns or to attach their property.

Property let out for rent from day to day to the public for wharfage purposes by a municipality as a wharfinger has been held exempt from seizure and sale on execution.

Klein v. *New Orleans, supra.*

A vessel while building and in an incomplete state in the hands of the builder has been held exempt from seizure and sale, provided only that title has passed to the sovereign.

United States v. *Ansonia Brass, etc., Co., supra;*
Title Guarantee & Trust Co. v. *Crane Co., supra.*

Although, if title has not passed, the property, although being built for the sovereign under a contract and for specific public purposes, may be attached and sold at the suit of holders of mechanics' liens.

United States v. *Ansonia Brass, etc., Co., supra.*

Light-ships used as aids to navigation have been held to be not attachable.

Briggs v. *Light-boats,* 93 Mass. (11 Allen) 157.

Funds of a government-owned railway are immune.
Mason v. *Intercolonial Railway,* 197 Mass. 349.

General personal property of a sovereign is likewise exempt.

Hassard v. *United States of Mexico,* 29 Misc. (N. Y.) 511; affirmed in 46 App. Div. (N. Y.) 632; and reaffirmed in 173 N. Y. 645;
Vavasseur v. *Krupp,* L. R., 9 Ch. D., 351;
De Haber v. *Queen of Portugal,* 17 Ad. & El. (N. S.) 175, 204;
Wadsworth v. *Queen of Spain,* 17 Ad. & El. (N. S.) 171, 215.

And the persons of sovereigns have regularly been held inviolate from the process of non-admiralty courts.

United States v. *McLemore,* 4 How. 286;
Hill v. *United States,* 9 How. 386;
United States v. *Clarke,* 8 Pet. 444;
United States v. *Eckford,* 6 Wall. 484;

Case v. *Terrell*, 11 Wall. 199;
Beers v. *Arkansas*, 20 How. 527;
McArthur Bros. Co. v. *Commonwealth*, 197 Mass. 137;
Sanders v. *Saxton*, 182 N. Y. 477;
Oliver American Trading Co. v. *United States of Mexico*, 5 F. (2nd) 659;
Mighell v. *Sultan of Johore* (1894), 1 Q. B. 149;
Duke of Brunswick v. *King of Hanover*, 2 H. L. Cas. 1;
Luther v. *James Sagor & Co.* (1921), L. R., 3 K. B., 532.

And non-admiralty courts in exempting the property of sovereigns generally have, like the admiralty courts, recognized that to proceed against their property is to proceed against the sovereigns themselves.

United States v. *Lee*, 106 U. S. 196;
Stanley v. *Schwalbe*, 147 U. S. 508;
Klein v. *New Orleans*, *supra*.

POINT VII.

The Decree of the District Court should be affirmed.

Respectfully submitted,

LOOMIS & RUEBUSH,
Proctors for the "Pesaro" and the Royal Italian Ambassador.

HOMER L. LOOMIS,
Of Counsel.

END

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SUPREME COURT OF THE UNITED STATES.

No. 334.—October Term, 1925.

Berizzi Brothers Company, Appellant, vs. The Steamship Pesaro.	Appeal from the District Court of the United States for the Southern District of New York.

[June 7, 1926.]

Mr. Justice Van Devanter delivered the opinion of the Court.

This was a libel *in rem* against the steamship "Pesaro" on a claim for damages arising out of a failure to deliver certain artificial silk accepted by her at a port in Italy for carriage to the port of New York. The usual process issued, on which the vessel was arrested; and subsequently she was released, a bond being given for her return, or the payment of the libellant's claim, if the court had jurisdiction and the claim was established. In the libel the vessel was described as a general ship engaged in the common carriage of merchandise for hire. The Italian Ambassador to the United States appeared and on behalf of the Italian Government specially set forth that the vessel at the time of her arrest was owned and possessed by that government, was operated by it in its service and interest; and therefore was immune from process of the courts of the United States. At the hearing it was stipulated that the vessel when arrested was owned, possessed and controlled by the Italian Government, was not connected with its naval or military forces, was employed in the carriage of merchandise for hire between Italian ports and ports in other countries, including the port of New York, and was so employed in the service and interest of the whole Italian nation as distinguished from any individual member thereof, private or official; and that the Italian Government never had consented that the vessel be seized or proceeded against by judicial process. On the facts so appearing the court sustained the plea of immunity and on that ground entered

a decree dismissing the libel for want of jurisdiction. This direct appeal is from that decree and was taken before the Act of February 13, 1925 became effective.

The single question presented for decision by us is whether a ship owned and possessed by a foreign government, and operated by it in the carriage of merchandise for hire, is immune from arrest under process based on a libel *in rem* by a private suitor in a federal district court exercising admiralty jurisdiction.

This precise question never has been considered by this Court before. Several efforts to present it have been made in recent years, but always in circumstances which did not require its consideration. The nearest approach to it in this Court's decisions is found in *The Exchange,* 7 Cranch 16, where the opinion was delivered by Chief Justice Marshall. There a libel was brought by citizens of this country against an armed vessel in the possession of French naval officers, the libellants' claim being that they were the true owners, that the vessel had been wrongfully taken from them and then converted into an armed vessel, and that they were entitled to have it restored to them through a proceeding in admiralty. Diplomatic correspondence resulted in the presentation by a law officer of this government of a formal suggestion in the suit to the effect that at the time of the arrest under the libel the vessel was claimed and possessed by the French Government as a war ship, was temporarily within our waters for a lawful purpose, and therefore was immune from the process whereon she was arrested. In the opinion the Chief Justice attributed to every nation an exclusive and absolute jurisdiction within its own territory subject to no limitation not having its consent, observed that the consent might be either express or implied, and then said (p. 136):

"The world being composed of distinct sovereignties, possessing equal rights and equal independence, whose mutual benefit is promoted by intercourse with each other, and by an interchange of those good offices which humanity dictates and its wants require, all sovereigns have consented to a relaxation in practice, in cases under certain peculiar circumstances, of that absolute and complete jurisdiction within their respective territories which sovereignty confers.

"This consent may, in some instances, be tested by common usage, and by common opinion, growing out of that usage.

"A nation would justly be considered as violating its faith, although that faith might not be expressly plighted, which should

suddenly and without previous notice, exercise its territorial powers in a manner not consonant to the usages and received obligations of the civilized world.

"This full and absolute territorial jurisdiction being alike the attribute of every sovereign, and being incapable of conferring extra-territorial power, would not seem to contemplate foreign sovereigns nor their sovereign rights as its objects. One sovereign being in no respect amenable to another; and being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express license, or in the confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated are reserved by implication, and will be extended to him.

"This perfect equality and absolute independence of sovereigns, and this common interest impelling them to mutual intercourse, and an exchange of good offices with each other, have given rise to a class of cases in which every sovereign is understood to waive the exercise of a part of that complete exclusive territorial jurisdiction, which has been stated to be the attribute of every nation."

After discussing the status of a sovereign, his ministers and his troops when they or any of them enter the territory of another sovereign, he proceeded (p. 141):

"If there be no treaty applicable to the case, and the sovereign, from motives deemed adequate by himself, permits his ports to remain open to the public ships of foreign friendly powers, the conclusion seems irresistable, that they may enter by his assent. And if they enter by his assent necessarily implied, no just reason is perceived by the Court for distinguishing their case from that of vessels which enter by express assent.

"In all cases of exemption which have been reviewed, much has been implied, but the obligation of what was implied has been found equal to the obligation of that which was expressed. Are there reasons for denying the application of this principle to ships of war?"

And then after suggesting that there is a wide difference between the status of private individuals who enter foreign territory, or send their private ships there for purposes of trade, and the status of public war vessels when in foreign waters, he further said (p. 145):

"It seems then to the Court, to be a principle of public law, that national ships of war, entering the port of a friendly power

open for their reception, are to be considered as exempted by the consent of that power from its jurisdiction.

"Without doubt, the sovereign of the place is capable of destroying this implication. He may claim and exercise jurisdiction either by employing force, or by subjecting such vessels to the ordinary tribunals. But until such power be exerted in a manner not to be misunderstood, the sovereign cannot be considered as having imparted to the ordinary tribunals a jurisdiction, which it would be a breach of faith to exercise. Those general statutory provisions therefore which are descriptive of the ordinary jurisdiction of the judicial tribunals, which give an individual whose property has been wrested from him, a right to claim that property in the courts of the country, in which it is found, ought not, in the opinion of this Court, to be so construed as to give them jurisdiction in a case, in which the sovereign power has impliedly consented to waive its jurisdiction."

It will be perceived that the opinion, although dealing comprehensively with the general subject, contains no reference to merchant ships owned and operated by a government. But the omission is not of special significance, for in 1812, when the decision was given, merchant ships were operated only by private owners and there was little thought of governments engaging in such operations. That came much later.

The decision in *The Exchange* therefore cannot be taken as excluding merchant ships held and used by a government from the principles there announced. On the contrary, if such ships come within those principles, they must be held to have the same immunity as war ships, in the absence of a treaty or statute of the United States evincing a different purpose. No such treaty or statute has been brought to our attention.

We think the principles are applicable alike to all ships held and used by a government for a public purpose, and that when, for the purpose of advancing the trade of its people or providing revenue for its treasury, a government acquires, mans and operates ships in the carrying trade, they are public ships in the same sense that war ships are. We know of no international usage which regards the maintenance and advancement of the economic welfare of a people in time of peace as any less a public purpose than the maintenance and training of a naval force.

The subsequent course of decision in other courts gives strong support to our conclusion.

In *Briggs* v. *Light Boats,* 11 Allen 157, there was involved a proceeding against three vessels to subject them to a lien and to satisfy it through their seizure and sale. The boats had been recently acquired by the United States and were destined for use as floating lights to aid navigation. Whether their ownership and intended use rendered them immune from such a proceeding and seizure was the principal question. In answering it in the affirmative the state court, speaking through Mr. Justice Gray, afterwards a member of this Court, said (p. 163): "These vessels were not held by the United States, as property might perhaps be held by a monarch, in a private or personal, rather than in a public or political character. . . . They were, in the precise and emphatic language of the plea to the jurisdiction, held and owned by the United States for public uses." And again (p. 165): "The immunity from such interference arises, not because they are instruments of war, but because they are instruments of sovereignty; and does not depend on the extent or manner of their actual use at any particular moment, but on the purpose to which they are devoted."

In *The Parlement Belge,* L. R. 5 P. D. 197, the question was whether a vessel belonging to Belgium and used by that government in carrying the mail and in transporting passengers and freight for hire could be subjected to a libel *in rem* in the admiralty court of Great Britain. The Court of Appeal gave a negative answer and put its ruling on two grounds, one being that the vessel was public property of a foreign government in use for national purposes. After reviewing many cases bearing on the question, including *The Exchange,* the court said:

"The principle to be deduced from all these cases is that, as a consequence of the absolute independence of every sovereign authority, and of the international comity which induces every sovereign state to respect the independence and dignity of every other sovereign state, each and every one declines to exercise by means of its Courts any of its territorial jurisdiction over the person of any sovereign or ambassador of any other state, or over the public property of any state which is destined to public use, or over the property of any ambassador, though such sovereign, ambassador, or property be within its territory, and, therefore, but for the common agreement, subject to its jurisdiction."

Sometimes it is said of that decision that it was put on the ground that a libel *in rem* under the British admiralty practice is not a

proceeding solely against property, but one directly or indirectly impleading the owner—in that instance the Belgian Government. But this latter was given as an additional and independent ground, as is expressly stated in the opinion at page 217.

The ruling in that case has been consistently followed and applied in England from 1880, when it was made, to the present day. *Young* v. *The Scotia,* 1903 A. C. 501; *The Jassy,* L. R. 1906 P. D. 270; *The Gagara,* L. R. 1919, P. D. 95; *The Porto Alexandre,* L. R. 1920, P. D. 30; *The Jupiter,* L. R. 1924, P. D. 236.

In the lower federal courts there has been some diversity of opinion on the question, but the prevailing view has been that merchant ships owned and operated by a foreign government have the same immunity that warships have. Among the cases so holding is *The Maipo,* 252 Fed. 627, and 259 Fed. 367. The principal case announcing the other view is *The Pesaro,* 277 Fed. 473. That was a preliminary decision in the present case, but it is not the one now under review, which came later and was the other way.

We conclude that the general words of section 24, clause 3, of the Judicial Code investing the district courts with jurisdiction of "all civil causes of admiralty and maritime jurisdiction" must be construed, in keeping with the last paragraph before quoted from *The Exchange,* as not intended to include a libel *in rem* against a public ship, such as the "Pesaro", of a friendly foreign government. It results from this that the court below rightly dismissed the libel for want of jurisdiction.

Decree affirmed.

A true copy.

Test

Clerk, Supreme Court, U. S.